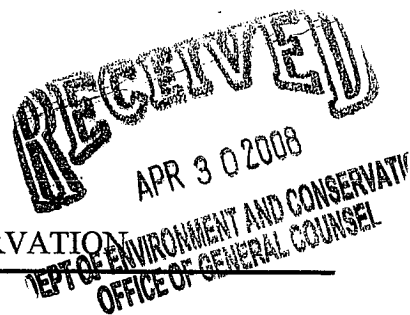


STATE OF TENNESSEE

DEPARTMENT OF ENVIRONMENT AND CONSERVATION



IN THE MATTER OF:)	
RICHARD MILITANA)	DIVISION OF WATER
RESPONDENT)	POLUTION CONTROL
)	CASE NUMBER WPC08-0067

PETITION TO SECURE AN APPEAL/REVIEW OF ORDER AND ASSESSMENT

COMES NOW, Respondent, Richard Militana, and files this Petition to review/appeal the Order and Assessment of Paul E. Davis representing the Department of Environment and Conservation, (hereinafter referred to as the "Department") with respect to Case Number WPC08-0067 (hereinafter "Order") requesting a hearing thereon, an extension of the compliance date pending a final determination, and states as follows:

BACKGROUND

The Order involves two separate and distinct complaints both involving less than ¼ acre (mol) of land, one in 2005 which involved Respondent's removal of trash and debris from a small corner of the property where water was flowing and attendant clearing of trash and debris from an existing stream bed and the other in late 2007 involving the building of two small stock ponds in anticipation of farm animals being placed upon the property. Both involved immediate mitigation action and prompt response to the Department. The property in question had two basic existing problems both of which were not natural and precipitated the work performed and the complaints cited herein:

- (1) *First (2005):* A flow of water was obstructed by trash (appliances, barrels, water heaters, tires etc), which were removed and hauled away. The trash and debris had obstructed the natural flow of water from along the existing stream bed in which

debris and trash was also removed which precipitated the first complaint in 2005 after which no further work was performed, the property returned to its otherwise natural condition, save only the trash removal and clearing of the existing stream bed, with both seed and straw being placed upon any exposed land, until 2 below, and;

Second (2007): By intrusion of water from the county road in front of the property at a point where a street level road access to the property existed, the county road being pitched toward the property which created substantial water intrusion from the county road which occasionally flooded the property. However this was remedied by the County's completing a ditch across the front of the property completing a system of ditches along the county road after which water no longer intruded upon the property from road drainage. The County started and completed this ditch on or about August of 2007 after which two small ponds to provide water for animals pursuant to agricultural usage were constructed in reliance upon the published brochure of the Department wherein it clearly stated that no permit was required for agricultural purposes. The small stock ponds form the basis of the second complaint were constructed in reliance upon the Department's brochure stating that no permit was required since the ponds were constructed pursuant to an agricultural purpose. It should be noted that the Department claimed that Williamson County had also violated the same rules and regulations as this Respondent, in constructing a ditch in front of the property in question. The County was instructed only to seed and straw the property disturbed, not to remove the ditch and place the County property back into its previous condition. Respondent immediately acted in like kind by also seeding and placing straw over any exposed ground to alleviate any prospective Department concerns believing such action should also resolve any outstanding issues with him. No further action upon the property was or is contemplated nor underway.

Materially related to the issues at hand, and due process, is the fact that Respondent had applied for and received, after County inspection, a formal permit for a driveway entrance from the County road. Respondent was advised, after application, inspection for and receiving the entry permit, that the Department called Williamson County and instructed that the Permit not be honored. No prior notice, hearing or any other normal process was provided either to the County or Respondent raising very serious issues involving the arbitrary taking of property rights by the State without any due process being afforded the Respondent.

The Order demands that the property be placed back into its initial condition. That would require Respondent to return all trash and debris back to the property creating the same nuisance and possible pollution the removal of which was calculated to prevent, fill in the ponds and place aquatic plants where none existed before nor could survive. Parity would also require the county to fill the ditch back in merely to facilitate the flooding of the property from road drainage during conditions of rain. With respect to the demand that trees be replaced, no live trees were removed upon the property where the work was being performed and upon which the Order is based. Trees were removed upon the elevated portions of the property upon which no work was complained of by the Department. No further action upon the property was done nor is any contemplated or underway by Respondent.

ARGUMENT

In the light of the above the Respondent would respectfully submit that the Order and Assessment as it relates to the First incident in 2005, being pursued in 2008, is a duplicitous complaint, attempting to resurrect a prior complaint in 2005 which had been already resolved, by affirmative mitigating actions, communications, agreements and attendant non-action by the Department, leading Respondent to reasonably believe that this initial matter had been amicably

resolved and therefore properly barred. To resurrect it at this late date would materially prejudice the rights of Respondent to answer the renewed complaint given the substantial passage of time.

It is the hope of this Respondent that the ideals of res judicata and double jeopardy should apply and that this Board not ignore the Respondent's proper response, action and reliance upon his resolution with the Department regarding the 2005 incident predicated upon the Department's assertion and Respondent's belief was an innocent loss of records relating thereto by the Department.

CONCLUSION

This Respondent has always respectfully and timely responded to every inquiry by the Department in writing, by affirmative action and telephonically. The matter involving the initial inquiry by the Department had been amicably resolved and should not be resurrected at this late date as such conduct would be manifestly unjust and prejudices the Respondent's rights.

It would therefore be manifestly unjust to resurrect, an already resolved matter simply in order to fortify a new complaint involving two small stock ponds based upon the assertion that the Department has lost the Respondent's reply letter and other communications and records which would have evidenced the amicable resolution and settlement regarding the first incident.

With respect to the most current objection to the small stock ponds, the Department demands are in direct conflict with its own publication. Respondent relied upon the publication promulgated by the Department and placed upon the internet to advise the public as to which circumstances a permit was required. This Publication clearly stated that no permit was required for agricultural purposes. The Department's demand that the property be placed back in the condition it was before any work was done would require the Respondent to place the trash and debris back onto the property to obstruct the natural flow of water which would be manifestly

unjust, unreasonable and confronts reason. Other actions demanded would materially disturb existing ground cover.

Respondent specifically incorporates by reference all communications with the Department into this appeal and specifically reserves all rights, including, without limitation, those related to Constitutional rights to due process and legal rights relating to equity and fair dealing which may have been violated by the Department.

In closing, it is important to note that Respondent has great respect for the Department, its members and for the purpose it serves and honestly believes that the Order is an honest manifestation of a failure of communication between Respondent and the Department. Therefore, it is the sincere hope of the Respondent that an amicable and reasoned resolution to this matter can be achieved.

WHEREFORE, the Respondent respectfully requests that he receive a hearing on this matter, that the timelines for compliance with the Order be stayed pending an outcome of this Review/Appeal and any appeal from an adverse ruling herein and such other relief as this Board may deem proper and just.

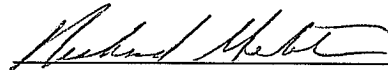
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent, postage prepaid, to, Appeal of Enforcement Order, TDEC-OGC, 20TH Floor L & C Tower, 401 Church Street, Nashville, Tennessee 37243-1548 on this 29th day of April, 2008.


Richard Militana